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Supreme Court, U.S.
FILED
NOV 28 1994
OFFICE OF THE CLERK

No. 94-557

In The

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA, *et al.*,

Petitioners,

vs.

SAMUEL PLATT, *et al.*; JIMMIE LEE SADDLER, *et al.*; and BRENDA ASHLEY, *et al.*,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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87 pp

QUESTIONS PRESENTED

Whether members of a class certified under Rule 23 may rely upon the District Court's certification determination as tolling the statutory period for filing charges of discrimination under Title VII, even where a defect is later found in the class representative's capacity and the class is decertified.

PARTIES TO THE PROCEEDINGS

The petitioners in this case are the State of Florida and Harry K. Singletary, in his capacity as Secretary of the Florida Department of Corrections.

The respondents are Michael Anderson, Sandra Anderson, Brenda Ashley, Bernice Atkins, David Babers, Louise Baker, Ronald J. Baker, Sr., Gary Black, Nelson Brooks, Jr., Anthony Brown, Brenda Brown, Laurene Brown, Tommie Brown, Yvonne Hampton Brown, Horace Calhoun, III, Curtis Carter, Tom Carter, Jr., Willie Clark, Julius LeVonne Chambers, Henry Chandler, Dennis Cohen, Romeo Cozart, Cassaundra Francis Dickey, Ronald L. Ellis, Walter Everitt, Jr., Willie Ewing, Sylvia Jean Forward, Billy Givens, Robert Hallback, Willie Harpe, James Haynes, David Henderson, Jimmy Hodore, Julius Hope, Mamie Jackson, Gary Jones, Martin Jones, Marvin E. Jones, Mable Kilpatrick, Lillie Mae Lewis, Ronald Anthony Martin, Sylvia Anne Martin, Walter M. McGinniss, James McNealy, Blake T. Moore, Sr., Michael Oyefesobi, Samuel Platt, Eddie Lee Richardson, Iola Rivers, Dale Rogers, Sherrell R. Rosier, Jimmie Lee Saddler, Marilyn Virginia Saucier, Eugene Shivalier, Norman Small, Dorothy Ann Solomon, Arbrea Spencer, Agnes Marie Strange, Charles H. Thomas, Ruthene Tukes, Johnnie Vance, Diann Walker, and Shirley Washington.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 3

WHY THE WRIT SHOULD BE DENIED 11

Whether members of a class certified under Rule 23 may rely upon the District Court's certification determination as tolling the statutory period for filing charges of discrimination under Title VII, even where a defect is later found in the class representative's capacity and the class is decertified.

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Construction Co. v. Utah,
414 U.S. 5354, 94 S.Ct. 766 (1974) ..... passim

Andrews v. Orr,
851 F.2d 146 (6th Cir. 1988) 17

Bailey v. Sullivan,
885 F.2d 52 (3d Cir. 1989) 19

Beaver's v. American Cast Iron Pipe Co.
975 F.2d 792 (11th Cir. 1992) 18

Bonner v. City of Pritchard,
661 F.2d 1206 (11th Cir. 1981)(en banc) 6

Bowen v. City of New York,
106 S.Ct. 2022 (1986) 18

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 23, 24 ..... passim

Edwards v. Boeing Vertol Company,
717 F.2d 761 (3d Cir. 1983) 15, 16

Eisen v. Carlisle & Jacquelin,
94 S.Ct. 2140 (1984) 15

General Telephone Co. v. Falcon,
457 U.S. 147 (1982) 7

Griffin v. Dugger,
823 F.2d 1476, 1494 (11th Cir. 1987),
cert. denied 108 S.Ct. 1729 ..... passim

Higginbotham v. Ford Motor Co.,
540 F.2d 762 (5th Cir. 1976)..... 6

McDonald v. Secretary of Health and Human Services,
834 F.2d 1085 (1st Cir. 1987)..... 19

McGinnis v. Ingram Equipment Co.,
918 F.2d 1491 (11th Cir. 1990)(en banc)..... 6

Sharpe v. American Express Company,
689 F.Supp. 294 (S.D.N.Y. 1988)..... 17

United Airlines v. McDonald,
432 U.S. 385 (1977),
97 S.Ct. 2464 (1977)..... 14

STATUTES

Title VII of the Civil Rights Act of 1964,
as amended..... passim

42 U.S.C. § 2000e-5(e) 3

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The Respondents, Michael Anderson, Sandra Anderson, Brenda Ashley, Bernice Atkins, David Babers, Louise Baker, Ronald J. Baker, Sr., Gary Black, Nelson Brooks, Jr., Anthony Brown, Brenda Brown, Laurene Brown, Tommie Brown, Yvonne Hampton Brown, Horace Calhoun, III, Curtis Carter, Tom Carter, Jr., Willie Clark, Julius LeVonne Chambers, Henry Chandler, Dennis Cohen,

Romeo Cozart, Cassaundra Francis Dickey, Ronald L. Ellis, Walter Everitt, Jr., Willie Ewing, Sylvia Jean Forward, Billy Givens, Robert Hallback, Willie Harpe, James Haynes, David Henderson, Jimmy Hodore, Julius Hope, Mamie Jackson, Gary Jones, Martin Jones, Marvin E. Jones, Mable Kilpatrick, Lillie Mae Lewis, Ronald Anthony Martin, Sylvia Anne Martin, Walter M. McGinniss, James McNealy, Blake T. Moore, Sr., Michael Oyefesobi, Samuel Platt, Eddie Lee Richardson, Iola Rivers, Dale Rogers, Sherrell R. Rosier, Jimmie Lee Saddler, Marilyn Virginia Saucier, Eugene Shivalier, Norman Small, Dorothy Ann Solomon, Arbrea Spencer, Agnes Marie Strange, Charles H. Thomas, Ruthene Tukes, Johnnie Vance, Diann Walker, and Shirley Washington urge the Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 17 F.3d 356 (11th Cir. 1994), and is reproduced in the petitioners' appendix at 12a through 23a. The order denying petitioners' motions for rehearing and rehearing *en banc* is reported at 24 F.3d 256 (May 26, 1994), and is reproduced in the petitioners' appendix at 24a-28a. The order denying respondents' motion for rehearing is reproduced in the petitioners' appendix at 29a-32a.

JURISDICTION

The Court's jurisdiction has been invoked by petitioners under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

42 U.S.C. ' 2000e - 5(e)

[Reprinted in petitioners' appendix at 34a]

STATEMENT OF THE CASE

Petitioners' Statement of the Case is substantially correct, but has been given a decidedly heavy "spin." Our relevant departures are noted below.

We disagree strongly with the petitioners respecting the import of the Eleventh Circuit decision in *Griffin v. Dugger*, 823 F.2d 1476 (1987). None of the respondents were parties to that proceeding, and none have ever had the opportunity to litigate the factual basis of Mr. Griffin's standing or the timeliness of Mr. Smith's Title VII charge of discrimination. Respondents are all former members of the certified class in the Griffin litigation, who, after filing proof of claim forms at the invitation of the district judge, relied upon the class action to vindicate their claims. When the Eleventh Circuit vacated the class certification order in 1987, the respondents, and more than 500 other class members, acted promply to advance their individual claims by filing charges of discrimination with the Florida deferral agency and the Equal Employment Opportunity Commission (EEOC). In due course, the EEOC found all of the charges of discrimination filed within 300 days of the Eleventh Circuit opinion to be timely, and issued "cause" determinations. The respondents also filed the cases which make up this litigation, primarily in response to notices of right to sue issued by the United States Justice Department.

A. Facts Material To Consideration Of The Question Presented

Because these cases did not proceed to trial, the facts are those alleged in the complaints and submitted by affidavit during motion practice. These are set forth, below, in the discussion of the course of proceedings. Petitioners'

detailed foray into the evidentiary facts of the Griffin litigation is entirely misplaced. The Griffin case is the only one of the three cases consolidated for argument in the Court of Appeals which the petitioners chose not to bring before this Court. It is also a case in which none of the respondents participated.[1] We take specific issue with the follow aspects of the Griffin discussion by petitioner.

At page 4 of the petition, it is suggested that an EEOC investigator drafted portions of Mr. Griffin's charge of discrimination. There was no competent evidence to that effect. Petitioners note the charge did not identify the correctional officer exam in the challenge on "hiring" practices. The correctional officer exam was an integral part of the hiring procedure; a correctional officer applicant was required to pass the exam as a condition of employment consideration. The further implication that Mr. Griffin did not allow the EEOC an adequate opportunity to resolve his charge is incorrect. Years after filing his charge, when it had become clear the EEOC might never act, Mr. Griffin requested a notice of right to sue, and commenced his own litigation.

At page 5, footnote 2, petitioner inaccurately suggests that Alvin Smith's EEOC charge was dismissed as untimely. The assertion is simply incorrect. Mr. Smith failed the examination after the class was certified and filed his charge of discrimination while the class remained certified. This information was not communicated to the district judge, however, because the district court had already ruled Mr. Smith could rely upon the charge filed by Griffin, which

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[1] Four of the respondents attempted to intervene in the Griffin litigation, but intervention was not permitted by the district court.

"exhausted administrative remedies for the whole class and for all claims."[2] The charge was filed after the Court of Appeals had assumed jurisdiction of the interlocutory appeal which resulted in the *Dugger* decision referenced above. Without any explanation, the Eleventh Circuit panel later recited that "Smith never filed a timely charge." *Id.*, at 823 F.2d 1481 n. 8. Respondents believe the only reasonable explanation is that the panel followed binding precedent of the Eleventh Circuit, and refused to consider a factual issue not first submitted to the district judge. *See, McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491 (11th Cir. 1990)(*en banc*); and, *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976).[3]

Petitioners' assertion at page 5 that the merits of the correctional officer exam have never been litigated is at least misleading. The exam was the subject of extensive discovery and a motion for summary judgment by the plaintiffs. Petitioners attempted to defend the exam, but did not attempt to prove the exam's disparate impact was justified by business necessity. Petitioners' statement that it refused to litigate the "business necessity" of the exam because of its belief the plaintiffs had no standing is not a rationale that was articulated to opposing counsel or the district court. At a hearing which discussed the plaintiffs' motion for summary judgment on the issue, then-counsel for petitioners told the district judge in open court that this Court's decision in *Teal v. Connecticut* had deprived

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[2] This ruling of the district court appears at document number 150, page 6 of the district court record.

[3] Fifth Circuit decisions rendered prior to October 1981 are binding on Eleventh Circuit panels. *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981)(*en banc*).

petitioners of their only defense. Thereafter, the district court granted plaintiffs' motion for summary judgment, holding the exam had disparate impact and was not justified by business necessity. The merits of the exam were fully litigated, notwithstanding petitioners tactical legal decision to forego an attempt to prove business necessity.

At page 6, petitioners suggest there were three versions of the exam at issue. Without any explanation for the delay, this factual allegation was raised for the first time years after the district judge granted summary judgment finding the exam discriminatory. It has not been subjected to discovery or factual scrutiny by the trial court. It stands as a bare allegation of petitioners. Petitioners note they ceased use of the discriminatory exam in August 1982, shortly following the district court's finding that the exam violated Title VII.

B. Course Of Proceedings Below

At page 6, petitioners refer to the stipulation which provided the initial basis for class certification. The stipulation, in addition to providing factual agreement, provided that the instant petitioners agreed the class was properly certified under the law as it existed at that time, but preserved the right of petitioners to withdraw from the stipulation if the controlling law or material circumstances of the case changed. This Court's decision in *General Telephone Co. v. Falcon,* 457 U.S. 147 (1982), provided the initial basis for petitioners' withdrawal from the stipulation.

In addition, it is important to understand that the respondents were among approximately 1500 class members who filed proof of claim forms with the district court concerning the correctional officer exam. Literally hundreds

of these class members were injured by the exam while the class remained certified.

In addition to the events described by petitioners, the *Dugger* decision resulted in the following events. After the Eleventh Circuit decision on the interlocutory appeal, more than 600 former certified class members filed charges of discrimination with the State deferral agency and with the EEOC.[4] Shortly thereafter, Samuel Platt -- who had filed a charge of discrimination on March 25, 1986, seventeen (17) months before the class certification order was vacated on appeal -- and 19 other members of the previously certified class filed an action on behalf of themselves and the formerly certified class on February 11, 1988. Platt had filed his charge while the class remained certified; all of the other Plaintiffs had filed charges of discrimination within approximately 180 days of the panel decision decertifying the class.[5] Platt had received a notice of right-to-sue from the United States Justice Department and filed his action within 90 days of receipt of that notice. All of the Platt plaintiffs have received "cause" findings by the EEOC.

In July 1990, Jimmie Lee Saddler and seven other Plaintiffs received right-to-sue notices from the U.S. Department of Justice and initiated the *Saddler* litigation. They sued with plaintiff Henry Chandler, who failed the

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[4] In due course, the EEOC found that all of the charges filed within 300 days of the Dugger decision to be timely, and issued a determination of "cause" on behalf of approximately 600 persons, including most of the respondents. The EEOC later issued a determination of failure of conciliation.

[5] Because Florida is a deferral state, the 300-day charge-filing period is applicable to claims arising in Florida.

examination in 1978 and who filed an EEOC charge in October 1987, within 90 days of the *Dugger*, decision.

In November 1990, Brenda Ashley and 32 other former Griffin class members received notices of right-to-sue from the U.S. Justice Department, and initiated the *Ashley* litigation on January 5, 1991. Some of the *Ashley* plaintiffs had filed charges of discrimination within 90 days of the *Dugger* decision, most filed within 180 days of the decision, and all filed within 300 days.

The complaints in all three cases alleged that the Florida Department of Corrections had utilized, until the district court declared it illegal in the fall of 1982, a written examination to screen applicants for correctional officer employment, that the written examination was not validated, had a disparate impact upon black applicants for employment as correctional officers, and was not justified by any business necessity. It noted the examination had been declared a violation of Title VII in the Griffin litigation. All of the complaints alleged the factual basis for the original class representative's, in the Griffin litigation, standing to file a charge of discrimination challenging the employment examination.[6] The complaints alleged the petitioners continued to utilize the test for years after they discovered it had a severe disparate impact upon black applicants, knowing it had not been validated.

In addition to the petitioners' comments regarding the Eleventh Circuit panel's March 29, 1994, decision, it is important to note that the cases were remanded to the district

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[6] *See, EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980).

court to "determine whether the individual plaintiffs filed timely charges which would permit them to continue their individual claims." (App. 23a).

WHY THE WRIT SHOULD BE DENIED

ARGUMENT

Whether members of a class certified under Rule 23 may rely upon the District Court's certification determination as tolling the statutory period for filing charges of discrimination under Title VII, even where a defect is later found in the class representative's capacity and the class is decertified.

The Eleventh Circuit's decision in this case studiously follows this Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 5354 (1974), and *Crown, Cork & Seal v. Parker*, 462 U.S. 345 (1983). These decisions have been repeatedly and harmoniously applied by most of the United States Courts of Appeals, without conflict among the circuits. Indeed, the petitioners' assertion, at page 9 of the petition, that the issue in this case is "of first impression" speaks loudly that there are no conflicts among the circuits and little reason for this Court to take jurisdiction. The petitioners argue the rule of *American Pipe* "has misled many federal courts ever since"[7], but identifies not one erroneous decision or even one instance where two circuits disagree on the application of the rule.

The petitioners' actual complaint is not with the development of law in the Eleventh Circuit, but with the concept of tolling during the pendency of a putative or certified class action, as developed by this Court. Petitioners

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[7] Petition at p.10.

argue the Title VII charge-filing period should not be tolled[8], but make no effort to distinguish the charge-filing period from the suit-filing period which this Court held in *Crown, Cork & Seal* is tolled by the pendency of a class action. Rather, petitioners attempt to raise the spectre of issues which have no arguable place in this litigation. Petitioners' cite Justice Blackmun's concurrence in *American Pipe* warning that attorneys should not be encouraged to frame class actions to "save members of the purported class who have slept on their rights."[9] 414 U.S. at 561. They cite Justice Powell's concurrence in *Crown, Cork & Seal* observing that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse."[10] 462 U.S. at 354. Yet, in this case, there is not even a hint of either abuse of the class action device or of the respondents sleeping on their rights. If anything, the respondents have been at risk in this case because of their forbearance.

This is a case which demonstrates the soundness of the tolling rule of *American Pipe* and *Crown, Cork & Seal.* Respondents participated in the Griffin litigation only as class members, relying upon the named plaintiffs to press their claims, the district judge's certification order, and the court reaffirmation of certification following this Court's decision in *Falcon.* They and approximately 1500 other class members filed proof of claim forms, but did not file an avalanche of EEOC charges while the class remained certified.[11] This forbearance was practiced even though

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[8] Petition at pp. 10-13.

[9] Petition at p. 11.

[10] Petition at p. 11.

[11] Respondent Platt filed an EEOC charge while the class remained certified, and ultimately received a notice of right to sue from the United States Justice Department.

literally hundreds of class members were injured by the discriminatory exam while the class remained certified. When the Eleventh Circuit decertified the class in 1987, most of the respondents, together with more than 500 other class members, promptly filed charges with the State deferral agency and the EEOC. In due course, the EEOC determined that all charges filed within the 300-day limitations period of 42 U.S.C. '2000e-5(e) were timely, and issued "cause" findings with respect to all such charges. Thereafter, the EEOC attempted to conciliate, and declared a failure of conciliation. Administrative remedies have been fully exhausted.

American Pipe was reaffirmed in *Crown, Cork & Seal Co. v. Parker*, holding:

> We conclude, as did the Court in American Pipe, that "the commencement of a class action suspends *the applicable statute of limitations* as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. 414 U.S. at 554, 94 S.Ct. at 766. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.

462 U.S. at 353-354, (emphasis supplied).

As long as the claims in which they were interested were being prosecuted by the certified class representatives, respondents had no reason to file a charge, to intervene, or to file a lawsuit, and this Court's precedent counseled against any such action:

> Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely upon the named plaintiffs to press their claims. And a class complaint "notifies the defendants not only of the substantive claims brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment."

Id., 462 U.S. at 352-353 (citations omitted).

There is good reason to believe the charge-filing period is an "applicable statute of limitations" under *Crown, Cork & Seal*. *United Airlines v. McDonald*, 432 U.S. 385 (1977), applied the tolling principle of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to intervenors in Title VII actions. Taking express note of the two limitations periods established by Title VII which are subject to tolling -- the charge filing period and the ninety-day limitation for filing suit after receiving a right-to-sue letter — 432 U.S. at 391-392 and n. 11 -- the Court allowed an individual who never had filed a charge of discrimination to intervene to appeal an order entered many years earlier denying class certification. The "critical fact" was that she acted "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representatives." *Id.* at 394. Even the dissenters in *McDonald* agreed that the filing of the class action tolled the limitations period for filing EEOC charges. In dissent, Justice Powell argued that McDonald should not be permitted to intervene for the purpose of appealing the order denying class certification, because she had allowed the charge-filing statute of limitation on her own claim to expire and thus had no interest in the litigation remaining.

He believed the charge-filing limitations period under Title VII was tolled by the filing of the class-action, but only until it was determined that a class action could not be maintained.

> A straight forward reading of *American Pipe* leads to the conclusion that the filing of the class action complaint in *Romasanto v. United Air Lines* tolled the statute of limitations for [McDonald to file her EEOC charge], but "only during the pendency of the motion to strip the suit of its class action character." Under the *American Pipe* rule, the statute of limitations [to file a charge of discrimination] had run against respondent by the time she attempted to intervene [at the conclusion of the suit, three years after Class certification had been denied].

Id., at 432 U.S. 397, 398.[12] By contrast, the respondents moved immediately on decertification of the class to file charges with the EEOC.

Numerous courts have recognized and applied the *Crown, Cork & Seal* equitable tolling rule, and several have had occasion to apply the rule expressly to the statute of limitation, or charge-filing limitation, of Title VII. In

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[12] In *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140 (1984), the Supreme Court made it clear that *American Pipe* tolling applies equally to putative and certified class actions. There, the Supreme Court rejected the plaintiffs' argument that it was useless to require notice of the opportunity to opt out to class members, since the limitations period on absent members claims had long since run, making the opportunity to opt out meaningless. The Court held the opt out opportunity remained meaningful, because "commencement of a class action tolls the applicable statute of limitations as to all members of the class." *Id.*, 94 S.Ct. at 2152 n. 13.

Edwards v. Boeing Vertol Company, 717 F.2d 761 (3d Cir. 1983), the court applied the tolling rule to a separate suit brought by a member of a certified class, even though the original case never lost its class status. Edwards, who brought a separate action after the class claims in which he was interested lost, argued the pendency of the class action had tolled his personal limitations period, allowing him to attack discriminatory acts occurring years earlier than the date on which he filed his EEOC charge. 717 F.2d 764. The court agreed, taking note of the Supreme Court admonition in *Crown, Cork & Seal* that failing to accord tolling would result in "a needless multiplicity of actions -- precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 717 F.2d 766, quoting from 103 S.Ct. 2395-96.

> The principles of the *American Pipe* and *Crown, Cork & Seal* decisions are equally applicable to his case.
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> * * *
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> Boeing Vertol would have us distinguish *American Pipe* and *Crown, Cork & Seal* because in this case, unlike them, a class was certified and the claims tried. Such a distinction would make no sense. Reliance on the pendency of a certified class action is more reasonable than the reliance on an uncertified class action which those cases approve. The certification of the class should discourage, rather than encourage, the proliferation of filings of individual actions. The distinction which is urged on us would produce the very evil which the Court sought to avoid in *American Pipe* and *Crown, Cork & Seal*. Consistency with the policies reiterated in *Crown, Cork & Seal* requires that the tolling of the statute of limitations

> continue until a final adverse determination of the class claims.

Id., 717 F.2d 766. A similar result was reached in *Andrews v. Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988), in which the court held "that the thirty day limitations period for filing individual administrative complaints [against the United States Government] was tolled during the pendency of the earlier class actions, . . ." *Id.*, at 851 F.2d 149.[13] The decision of the district court in *Sharpe v. American Express Company*, 689 F.Supp 294 (S.D.N.Y. 1988), also succinctly summarizes the reasoning for extending the *American Pipe* "tolling doctrine to . . . class members who want to begin the administrative process by filing a claim with the EEOC." 689 F.Supp 300. Faced with the precise question, the court explained:

> As the *Parker* Court noted, "[l]imitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, . . . [citations omitted], but these ends are met when a class action is commenced." 462 U.S. 352, 103 S.Ct. at 2397. Applying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the

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[13] The court also discussed a question not presented by the facts of this case — whether successive class actions can effectively "piggy-back" one limitation tolling period on top of another, delaying implementation of the statute of limitation indefinitely. The factual scenario presented to the circuit court demanded the question be answered in the negative. Nevertheless, the issue is not presented here. No additional tolling was sought. Respondents originally filed new class actions, not to obtain additional tolling, but simply to litigate their claims with the efficiency provided by Rule 23.

> statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims with the EEOC and the respective state agencies in deferral states.

Id., 689 F.Supp 300.

In addition, this Court's treatment of the issue of equitable tolling of limitations periods in other kinds of administrative proceedings makes it reasonable that Title VII's charge filing period is an "applicable statute of limitations" subject to equitable tolling under *Crown, Cork & Seal*. Although the occasion to apply equitable tolling was somewhat different in *Bowen v. City of New York*, 106 S.Ct. 2022 (1986), the court tolled the limitations periods for both class members who never filed a claim, and for those whose claims had lapsed by the time the class action was filed. The court instructed that the proper approach is to "determine . . . whether equitable tolling is consistent with Congress' intent in enacting [the statute at issue], and whether tolling is appropriate on [the] facts." *Bowen*, at p. 2030. In this regard, the court found the SSA statute to be "unusually protective" of claimants. No less can be said of the statute involved in this case, Title VII. It is our national policy to eradicate arbitrary and discriminatory barriers to the exercise of equal employment opportunity for all inhabitants, and Title VII is the primary vehicle to that goal. Indeed, the Court's decision in *Crown, Cork & Seal* is itself an expression that equitable tolling is consistent with the Congressional intent in enacting Title VII.[14] Consistent with

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[14] The Eleventh Circuit has, itself, tolled the limitations charge-filing period where it found the underlying conduct to be "continuing" in

this Court's expression of Rule 23 policy, several Courts of Appeals have had occasion to expressly apply *Crown, Cork & Seal* to administrative limitations periods other than Title VII. In *McDonald v. Secretary of Health and Human Services*, 834 F.2d 1085 (1st Cir. 1987), the appeals court held it proper under *Crown, Cork & Seal* for the district court to revive claims of class members which had been dormant in the administrative pipeline during the pendency of the case, even though the class members had failed to appeal to the next administrative level. The court explained:

> While this case differs from *Crown Cork & Seal* and *American Pipe* in that the 60-day limitations periods pertained to administrative exhaustion, the principles discussed therein are generally applicable. In *Bowen*, 106 S.Ct. at 2029, the Supreme Court reaffirmed that section 405 (g)'s 60-day limitations period for *judicial* review is not jurisdictional, but rather constitutes a statute of limitations.

Id. at 1092. Likewise, in *Bailey v. Sullivan*, 885 F.2d 52, 65 (3d Cir. 1989), the court construed *Crown, Cork & Seal* to toll administrative limitations and exhaustion requirements. "We must decide then whether similar principles [as those expressed in *Crown*] can be used to justify waiver of administrative exhaustion for claimants who received an adverse determination but who did not request reconsideration, an ALJ hearing, or appeal to the Appeals Council." After reviewing the rationale of the decision, and the application of the principles in other administrative cases, the appeals court "conclud[ed] that the class entitled to

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nature, in *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992). A continuing violation of Title VII is another circumstance in which equitable tolling is merited.

readjudication of their claims because they were denied benefits . . . includes those claimants who failed to exhaust their administrative remedies. . . ."

The petitioners have relied heavily, but erroneously, on the Eleventh Circuit opinion in *Griffin v. Dugger*. The *Dugger* opinion does not even discuss the issue of tolling, or the import of either *American Pipe* or *Crown, Cork & Seal*. Likewise, the petitioner has attempted to rely upon and reason backward from what has become known as the "single filing rule." While there are similarities in the two equitable doctrines, the Court of Appeals in this case based its reasoning on tolling considerations, not on the "single filing rule."

As a matter of policy and good sense, a tolling rule — which has the purpose of encouraging forbearance in the filing of a multiplicity of claims — must not be unduly restrictive or technical, and must give potential claimants confidence that it will be reliably applied. Otherwise, claimants, and their attorneys, will always file every arguable claim in order to protect against the possibility the tolling rule may not be applied. Much of the efficiency of Rule 23 will be lost.

The writ should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

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